

**JEFFREY A. LOCKE**  
Claimant

**BARND'S BROTHERS, INC.**  
Respondent

**CINCINNATI INSURANCE COMPANY**  
Insurance Carrier

- Claimant stipulated respondent had sufficient work to employ claimant 40 hours each week within the restrictions of Drs. Chris D. Fevurly and Michael J. Poppa, but he simply cannot work 40 hours per week.
- Claimant stipulated he has a 66 $\frac{2}{3}$ % task loss based upon Dr. Poppa's restrictions and Michael J. Dreiling's task analysis.

- Respondent stipulated claimant's whole body functional impairment rating qualified claimant for a work disability.
- The parties stipulated that if the Board finds claimant is entitled to a work disability, claimant sustained a 46% wage loss.
- The parties agreed to allow the Board to consult the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>1</sup> in making its decision.

At the October 23, 2015, oral argument, the parties stipulated Drs. Black and Beatty were claimant's authorized treating physicians.

### ISSUES

In a December 12, 2013, Award, ALJ Kenneth J. Hursh determined claimant met the conditions required for work disability set forth in K.S.A. 2011 Supp. 44-510e. The ALJ found claimant sustained a 15% whole body functional impairment and a 46.5% work disability (based upon a 47% task loss and a 46% wage loss). The ALJ also awarded claimant future medical benefits.

With regard to wage loss, the ALJ stated:

The record showed the claimant's post-injury wage loss is directly attributable to the injury and failed to rebut the presumption on actual post-injury wage. Simply, the court felt the claimant was telling the truth about how much he can work even though none of the physicians imposed a restriction on his hours. The court did not think the claimant was creating a false impression of his capabilities. He is making an honest effort to remain employed.<sup>2</sup>

Respondent appealed the Award to the Board. In a June 17, 2014, Order, the Board majority found claimant was entitled to a 24% whole body functional impairment, but not to permanent partial disability benefits based upon a work disability. The majority determined respondent rebutted the presumption that claimant's post-injury wages were what he was capable of earning. The majority also concluded:

Simply put, because no authorized treating physician imposed restrictions upon claimant, he could return to his former job activities, working the same hours he

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<sup>1</sup> The parties did not specify the Board's request to consult the American Medical Association, *Guides to the Evaluation of Permanent Impairment* was limited to the 4th Edition.

<sup>2</sup> ALJ Award at 5.

worked prior to his accident. Therefore, the presumption contained in K.S.A. 2011 Supp. 44-510e(a)(2)(E)(iii) does not apply.<sup>3</sup>

Two Board Members dissented, finding the presumption in K.S.A. 2011 Supp. 44-510e(a)(2)(E) was not rebutted, claimant's actual post-injury earnings represented his wage earning capability and claimant was entitled to a work disability award.

Claimant appealed the Board's Order to the Kansas Court of Appeals. In its May 1, 2015, unpublished opinion, the Court reversed the Board's determination that claimant was ineligible for permanent partial disability benefits based on a work disability and remanded the claim for further proceedings consistent with the decision. The Board's finding that claimant sustained a 24% whole body functional impairment was not an issue reviewed by the Kansas Court of Appeals.

Respondent requests the Board enter an Order on remand that sets forth specifically and separately the facts rebutting the presumption of actual wage loss and the facts that demonstrate claimant is physically capable of earning 90% or more of his pre-injury gross average weekly wage.

Claimant requests the Board find he has a 66⅔% task loss and a 46% wage loss resulting in a 56⅓% work disability.

The issue is: to what, if any, permanent partial disability benefits based on a work disability is claimant entitled?

#### **FINDINGS OF FACT**

The Board incorporates by reference herein the findings of fact set forth in its June 17, 2014, Order.

Claimant was 49 years old when Michael J. Dreiling, vocational consultant, issued his report dated June 11, 2013. Mr. Dreiling indicated claimant possesses no typing skills and has limited knowledge of using a personal computer. In approximately 2001, claimant completed a heating and air conditioning vocational-technical training program. Mr. Dreiling indicated claimant used the aforementioned training while working in the labor market. According to Mr. Dreiling, it is anticipated claimant cannot improve his post-injury average weekly wage beyond what he is making at his post-injury accommodated light-duty position and his current earnings are representative of his current ability and capacity to perform work in the open labor market.

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<sup>3</sup> *Locke v. Barnds Brothers, Inc.*, No. 1,059,568, 2014 WL 3055450 (Kan. WCAB June 17, 2014), reversed and remanded, *Locke v. Barnds Brothers, Inc.*, No. 112,029, 2015 WL 2137207 (Kansas Court of Appeals unpublished opinion filed May 1, 2015).

As stated above, the Kansas Court of Appeals reversed and remanded this matter to the Board. In doing so, the Kansas Court of Appeals stated:

Assuming the presumption [that an injured worker's actual postinjury wages reflect what he or she is capable of earning] has been rebutted in a given case, the ALJ and the Board must then determine a worker's postinjury earning capacity "based upon a consideration of all factors." K.S.A. 2014 Supp. 44-510e(a)(2)(E). The nonexclusive list of factors includes "the injured worker's . . . physical capabilities."

In making that determination, the Board majority faltered in taking far too narrow a view of the evidence regarding Locke's postinjury earning capability. The majority doesn't provide any analysis on this point and seems to have relied on the same evidence and reasoning it used to find the presumption had been rebutted. But that approach disregards relevant factors, particularly Locke's chronic postinjury pain. As we have said, K.S.A. 2014 Supp. 44-510e(a)(2)(E) identifies the worker's "physical capabilities" to be among the relevant factors. A worker's inability to perform particular tasks or to remain on duty for a set number of hours because of pain caused by a compensable injury is a factor bearing on physical capability. The limitations resulting from the pain must be considered in determining the worker's postinjury earning capacity.

As best we can tell, the Board simply ignored Locke's chronic pain in reaching its decision. The omission amounts to an obvious legal error and reflects a ground on which we may review the agency decision. K.S.A. 2014 Supp. 77-621(c)(4). Because we do not weigh evidence or substitute our judgment for the Board's properly considered conclusions, the appropriate remedy here is remand. On remand, the Board should follow the statutory directive of K.S.A. 2014 Supp. 44-510e(a)(2)(E) and take account of all factors relevant to Locke's postinjury earning capability, including his chronic pain.

The Board majority did not outline its reasoning on this point, so we have no direct indication why the determination went off course. The dissenters suggest the majority wanted to prevent workers from exaggerating or outright fabricating claims of postinjury pain to obtain work disability benefits. By refusing to consider chronic pain as a "factor" in determining wage loss as a matter of law, the Board majority would accomplish that objective. But with that tack, the Board recasts the statutory language into something it is not. Malingering in the form of unwarranted assertions of postinjury pain may be a problem in some cases. The problem, however, presents a fact issue to be resolved on the evidence in a given case—not something that has been scrubbed from workers compensation law by statutorily rendering postinjury pain irrelevant for any purpose. Here, of course, the Board has already made a credibility finding favoring Locke, removing any specter of artifice in *this* case.

On appeal, Barnds Brothers reprises an alternative argument it unsuccessfully presented during the administrative process: Locke refused

“accommodated employment,” thereby “result[ing] in a rebuttable presumption of no wage loss,” as provided in K.S.A. 2014 Supp. 44-510e(a)(2)(E)(iii). We find the argument unavailing because that subsection is factually inapplicable. The Board similarly rejected Barnds Brothers' position.

Subsection K.S.A. 2014 Supp. 44-510e(a)(2)(E)(iii) provides: “The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.” Barnds Brothers contends the light-duty work offered to Locke after his injury constitutes accommodated employment within the meaning of K.S.A. 2014 Supp. 44-510e(a)(2)(E)(iii).

Under the statutory language, accommodated employment must conform to restrictions put in place by “the authorized treating physician.” The term “authorized treating physician” is one of art and has been specifically defined in the Workers Compensation Act as a “physician or other health care provider authorized by the employer or insurance carrier or both, or appointed pursuant to court-order to provide those medical services deemed necessary to diagnose and treat an injury[.]” K.S.A. 2014 Supp. 44-508(v).

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We reverse the Board's determination that Locke was ineligible for permanent partial disability benefits based on a work disability and remand for further proceedings consistent with this decision.<sup>4</sup>

### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>5</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”<sup>6</sup>

K.S.A. 2011 Supp. 44-510e(a)(2), in part, states:

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<sup>4</sup> *Locke v. Barnds Brothers, Inc.*, No. 112,029, 2015 WL 2137207 (Kansas Court of Appeals unpublished opinion filed May 1, 2015).

<sup>5</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>6</sup> K.S.A. 2011 Supp. 44-508(h).

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

Claimant interprets *Locke*<sup>7</sup> to mean the Kansas Court of Appeals reversed the Board majority's finding that claimant was ineligible for a work disability. Claimant relies on the following passage in *Locke*, "We reverse the Board's determination that Locke was ineligible for permanent partial disability benefits based on a work disability and remand for further proceedings consistent with this decision."<sup>8</sup> Claimant contends the Board's only task is to determine the extent of claimant's work disability.

Respondent interprets *Locke* much differently. It asserts the Kansas Court of Appeals did not *per se* determine claimant was ineligible for work disability, but rather concluded the Board failed to provide specific reasons why claimant was ineligible for a work disability. Respondent suggests the Board can comply with the Court's ruling in *Locke* by finding claimant is ineligible for a work disability and identifying specific facts it relied upon to determine claimant was capable of earning 90% or more of his pre-injury wages. Respondent suggested eight specific reasons why claimant's wage loss was insufficient for a work disability.

The Kansas Court of Appeals stated the Board "ignored Locke's chronic pain in reaching its decision"<sup>9</sup> and that "omission amounts to an obvious legal error."<sup>10</sup> The Court then gave the following instructions to the Board:

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<sup>7</sup> *Locke v. Barnds Brothers, Inc.*, No. 112,029, 2015 WL 2137207 (Kansas Court of Appeals unpublished opinion filed May 1, 2015).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Because we do not weigh evidence or substitute our judgment for the Board's properly considered conclusions, the appropriate remedy here is remand. On remand, the Board should follow the statutory directive of K.S.A. 2014 Supp. 44-510e(a)(2)(E) and take account of all factors relevant to Locke's postinjury earning capability, including his chronic pain.<sup>11</sup>

The Board, as instructed by the Kansas Court of Appeals, considers claimant's chronic pain a factor that reduces his capability to earn post-injury wages. When claimant's chronic pain and the other factors set forth in K.S.A. 2011 Supp. 44-510e(a)(2)(E) are considered, claimant is incapable of earning 90% or more of his pre-injury wages.

On two occasions, claimant attempted to resign from his job at respondent, because he could not maintain prior performance levels due to chronic pain and being physically unable to perform the work. Claimant testified that when he returned to work after recovering from his accident, he did not work more hours because of back and foot pain. Claimant indicated that he will get up in the morning and will be in so much pain that he could not get into his work van, drive comfortably and perform his job. Claimant provided detailed reasons why he could no longer perform many of the job tasks identified by Mr. Dreiling. Mr. Barnds testified claimant was physically weaker than before his injury, walks with a cane and the day after completing a job, complains of soreness.

Mr. Dreiling indicated pain can be a limiting factor on a person's ability to obtain and maintain employment, considering the type of work they do. The Board finds Mr. Dreiling's opinion credible that claimant cannot improve his post-injury average weekly wage beyond what he is making at his post-injury accommodated position at respondent and his current earnings are representative of his current ability and capacity to perform work in the open labor market. Claimant's education is limited to graduating from high school and completing a heating and air conditioning vocational education program. He has no typing skills, limited computer skills, is a longtime employee of respondent and in June 2013 was 49 years old.

The parties stipulated that if claimant was eligible for a work disability, he sustained a 46 percent wage loss. With respect to task loss, the Board adopts the analysis and reasoning of the ALJ when he stated:

Based on permanent work restrictions from physicians, the claimant's task loss was shown to be in the 23% to 71% range. It is held the claimant's task loss is the midpoint of that range, 47%. This figure, averaged with the claimant's 46% wage loss produces a 46.5% work disability.<sup>12</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> ALJ Award at 6.



**CONCLUSION**

Claimant sustained a 46.5% work disability.

**AWARD**

**WHEREFORE**, the Board modifies the December 12, 2013, Award entered by ALJ Hursh.

Claimant is entitled to 21 weeks of temporary total disability benefits at the rate of \$555 per week, or \$11,655; followed by \$8,276.73 in temporary partial disability benefits; followed by 183.25 weeks of permanent partial disability benefits at the rate of \$555 per week, or \$101,703.75, based upon a 24% whole body functional impairment followed by a 46.5% work disability, for a total of \$121,635.48, all of which is due and owing, less any amounts previously paid. The Board affirms the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Kenneth J. Hursh, Administrative Law Judge